IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 728

ELIZABETH NOWINSKI, *Petitioner*,

v.

RANDALL H. HAGNER & COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RANDALL H. HAGNER & COMPANY IN OPPOSITION

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit wrote no opinion below and its Order, review of which is sought, is not reported. A copy of the Order of said Court denying the allowance to it of an appeal, by petitioner, from the judgment of the Municipal Court of Appeals for the District of Columbia appears at

p. 183 of the record. Its Order denying reconsideration appears at p. 184 of the record.

The opinion of the Municipal Court of Appeals for the District of Columbia is reported at 100 A. 2d (Adv. Ops.) 452.

JURISDICTION

The Order of the Court below was entered January 15, 1954 (R. 183). Rehearing was denied January 27, 1954 (R. 184). The Petition for a Writ of Certiorari was filed April 27, 1954. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (designated by petitioner as 28 U. S. C. A. § 254).

QUESTION PRESENTED

Whether this Court is required to review the exercise of discretion by the United States Court of Appeals for the District of Columbia Circuit, which refused to allow an appeal to it from a judgment of the Municipal Court of Appeals for the District of Columbia.

STATUTES INVOLVED

11 D. C. Code (1951 Ed.) § 772.
11 D. C. Code (1951 Ed.) § 773.
45 D. C. Code (1951 Ed.) § 910.
45 D. C. Code (1951 Ed.) Supp. I, § 1601.
45 D. C. Code (1951 Ed.) Supp. I, § 1605(b)(1)(A).

The applicable statutes are set forth in Appendix A hereto.

RULES OF COURT INVOLVED

Rule 1, Rules of the United States Court of Appeals for the District of Columbia Governing Review of Cases from the Municipal Court of Appeals for the District of Columbia.

The applicable Rules of Court are set forth in Appendix B hereto.

STATEMENT OF THE CASE

This is a Landlord and Tenant case.

Respondent, as landlord of petitioner, filed in the Landlord and Tenant Branch of the Municipal Court for the District of Columbia a Complaint for possession of Apartment 627 Dorchester House, 2480 Sixteenth Street, Northwest, on two grounds (R. 141). After being continued from time to time both before and during trial, the trial judge sitting without a jury found for respondent and against petitioner, eventually on both grounds set forth in the Complaint (R. 142). Judgment was entered on such finding (R. 146). After a motion for a new trial was denied by the trial court, petitioner appealed to the Municipal Court of Appeals for the District of Columbia from the judgment of the trial court. The Municipal Court of Appeals for the District of Columbia affirmed the judgment of the trial court (R. 172).

Petitioner thereafter applied to the United States Court of Appeals for the District of Columbia Circuit for the allowance of an appeal from the judgment of the Municipal Court of Appeals for the District of Columbia. Her petition was denied (R. 183). Reconsideration was also denied (R. 184).

Petition for Certiorari was filed in this Court seeking review of the Order of the United States Court of Appeals for the District of Columbia Circuit denying the allowance of an appeal to it from the judgment of the Municipal Court of Appeals for the District of Columbia.

SUMMARY OF ARGUMENT

1. (a) This Court lacks jurisdiction under 28 U. S. C. § 1254, to review the Order of the United States Court of Appeals for the District of Columbia Circuit denying the Petition for allowance of an appeal.

(b) This Court should not exercise jurisdiction to correct judgments of the courts of the District of Columbia construing statutes purely local in application.

2. The United States Court of Appeals for the District of Columbia Circuit did not abuse its discretion where, considering the record before it, it denied the allowance of an appeal to it from the judgment of the Municipal Court of Appeals for the District of Columbia.

ARGUMENT

1. (a) This Court Lacks Jurisdiction Under 28 U. S. C. § 1254, to Review the Order of the United States Court of Appeals for the District of Columbia Circuit Denying the Petition for Allowance of an Appeal.

The Order, review of which is sought, involves the denial by the United States Court of Appeals for the District of Columbia Circuit of the allowance to it of an appeal from the judgment of the Municipal Court of Appeals for the District of Columbia.

28 U. S. C. § 1254, where applicable to this case, authorizes the review by this Court of cases in the courts of appeals by Writ of Certiorari upon the petition of any party to any civil case. 11 D. C. Code (1951 Ed.) § 773, permits a party aggrieved by a judgment of the Municipal Court of Appeals for the District of Columbia to seek review in the United States Court of Appeals for the District of Columbia Circuit by petition for the allowance of an appeal. Unless and until the United States Court of Appeals for the District of Columbia Circuit grants a petition for the allowance of such an appeal, the cause is not a "case in the Court of Appeals" reviewable by this Court by Writ of Certiorari under the section of the United States Code whereby the jurisdiction of this Court is invoked. *Ferguson* v. *District of Columbia*, 270 U. S. 633, 46 S. Ct. 355, 70 L. Ed. 771; *House* v. *Mayo*, 324 U. S. 42, 44, 65 S. Ct. 517, 89 L. Ed. 739, *rehearing denied*, 324 U. S. 886, 65 S. Ct. 689, 89 L. Ed. 1435.

1. (b) This Court Should Not Exercise Jurisdiction to Correct Judgments of the Courts of the District of Columbia Construing Statutes Purely Local in Application.

The District of Columbia Emergency Rent Act as Amended (45 D. C. Code [1951 Ed.] Supp. I, Sec. 1601, *et seq.*) is a statute enacted by Congress purely local in its application. It might be noted parenthetically that this statute expired on July 31, 1953. [45 D. C. Code (1951 Ed.) Supp. I, 1601(b), as amended.]

This Court has stated repeatedly that it will not ordinarily review decisions of the courts of the District of Columbia based upon or construing statutes limited in their application to, or which declare the common law of, the District of Columbia. *American Security & T. Co.* v. *District of Columbia*, 224 U. S. 491, 32 S. Ct. 553, 56 L. Ed. 856; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285, 56 S. Ct. 190, 80 L. Ed. 229; *District of Columbia* v. *Pace*, 320 U. S. 698, 702, 64 S. Ct. 406, 88 L. Ed. 408. See *United Surety Company* v. *American Fruit Product Company*, 238 U. S. 140, 35 S. Ct. 828, 59 L. Ed. 1238. See also *Fisher* v. *United States*, 328 U. S. 463, 66 S. Ct. 1318, 90 L. Ed. 1382, 166 A. L. R. 1176.

Since by its terms the District of Columbia Emergency Rent Act applies only to the District of Columbia and since the United States Court of Appeals for the District of Columbia Circuit in its discretion, as governed by applicable statute and by Rule of Court hereinafter discussed, did not deem the matter to be of sufficient importance to require review, no reason exists for this Court to grant certiorari to consider the cause.

2. The United States Court of Appeals for the District of Columbia Circuit Did Not Abuse its Discretion Where, Considering the Record Before It, It Denied the Allowance of an Appeal to It From the Judgment of the Municipal Court of Appeals for the District of Columbia.

Cases involving the right to possession of real estate (exclusive of cases in which title to realty is involved) are

within the jurisdiction of the Municipal Court for the District of Columbia (45 D. C. Code [1951 Ed.] § 910). Respondent's Complaint for possession (R. 141) was filed in said Court and possession was sought on two grounds authorized by the then effective District of Columbia Emergency Rent Act:

(i) that petitioner had violated a provision of her lease, to wit, "... that the lessee will not use said premises in any manner which will disturb the other tenants of the building or be offensive to any other occupant of the building ..."

and

(ii) that she was using the premises in such a manner as to constitute a nuisance (R. 155).

45 D. C. Code (1951 Ed.) Supp. I, 1605(b)(1)(A) authorizes landlord to seek possession of housing accommodations on the grounds set forth in the Complaint. The record made in the trial court discloses the following: Trial of the case was commenced before a judge of the Municipal Court for the District of Columbia on May 4, 1953, adjourned until May 27, 1953; thereafter, not being fully heard, the trial was adjourned until June 2, 1953 and concluded on that date. For the respondent certain of its employees testified as well as certain tenants of the building and a frequent visitor to the apartment of one of the tenants. The tenants who testified on behalf of the respondent were the tenant occupying the apartment above petitioner (R. 87); the tenant occupying the apartment above and to one side of petitioner (R. 80); the tenant occupying the apartment below that occupied by petitioner (R. 3); and a former tenant who had previously occupied the apartment below that occupied by petitioner (R. 71). Their testimony appears at length in the transcript of the trial.

Petitioner's witnesses consisted of two ladies who visited petitioner from time to time in her apartment (R. 118, 122),

a tenant of the building who lived on the same floor as petitioner and across the hall from her (R. 114), certain employees of respondent (R. 126, 127) and the wife of one of respondent's witnesses. Petitioner took the stand and testified on her own behalf (R. 132, *et seq.*).

Respondent terminated its case late in the morning of June 2, 1953, whereupon after a motion to dismiss on behalf of petitioner, which was denied by the trial court, petitioner commenced the presentation of her case. After examination of one witness, petitioner's attorney asked for an early recess for lunch in order that he might get certain witnesses "not under subpoena, just residents of Dorchester House whom I want to put on the stand."

He assured the Court that these witnesses would be available by one o'clock (R. 113). The Court asked if petitioner's attorney desired help in securing these witnesses and he replied in the negative. Thereupon a recess was had until one o'clock.

After the lunch recess, petitioner continued with the presentation of her case, calling three witnesses to testify. At the request of petitioner's attorney, a recess was held in order that there might be called on petitioner's behalf a witness whom she desired to have testify (R. 125). After this recess, petitioner's attorney informed the Court that he could not find the desired witness and stated: "I am going on without him" (R. 126). No continuance was asked and no proffer of his testimony was made, nor was it shown that the desired witness was under subpoena, nor was a "forthwith" subpoena asked of the Court. Petitioner then called three more witnesses and took the stand on her own behalf (R. 132, *et seq.*). At the conclusion of petitioner's direct testimony, there being no cross-examination by respondent, petitioner closed her case (R. 139). No continuance was requested, no statement was made to the Court that petitioner had not concluded, nor was any statement made to the Court that further testimony was desired on petitioner's behalf by witnesses who were unavailable.

This then was the record of the trial in which petitioner now claims to have been deprived of a fair hearing and opportunity to be heard and at which she claimed she was not afforded a full and ample opportunity to present all testimony germane to her case.

On appeal to the Municipal Court of Appeals for the District of Columbia, petitioner urged that the trial court had erred in two respects:

(1) in its finding of facts because the evidence as a whole did not support a finding for respondent, and

(2) that the landlord had waived its right with respect to the enforcement of the covenant not to disturb other tenants.

In due course the Municipal Court of Appeals for the District of Columbia affirmed the judgment of the trial court stating in its opinion, in effect:

A. that the nuisance count was moot by reason of the expiration of the District of Columbia Emergency Rent Act;

B. that although there was a sharp conflict in the testimony as to the manner in which petitioner had played her piano, the Municipal Court of Appeals would not review the testimony or resolve the conflict therein, this being the function of the trial court;

C. that the question of waiver was governed by the decision of the Municipal Court of Appeals in *Hall* v. *Henry J. Robb* (D. C. Mun. App. 1943), 32 A. 2d 707 (R. 171).

The foregoing constituted in substance the record before the United States Court of Appeals for the District of Columbia Circuit on petitioner's Petition for Allowance of an Appeal.

Before the United States Court of Appeals for the District of Columbia, as before this Court, petitioner urged that she had been denied adequate time and opportunity to present all the evidence on her behalf; that the trial

court erred in refusing to reopen the case after the conclusion of the presentation of petitioner's case; that the trial court abused its discretion in desiring to terminate the case.

The record before the United States Court of Appeals for the District of Columbia Circuit as before this Court will disclose that petitioner had a fair and impartial trial, that she had ample opportunity to present any witnesses or testimony available to her or desired by her to be presented. As to the myriad witnesses that petitioner now urges she would like to be heard, it would appear from the record that they were not under subpoena. She elected to proceed without them and without making any proffer of their testimony, without requesting a continuance until they might be able to testify (R. 114) and without accepting the offer of the trial judge to make these witnesses available to her (R. 113). Petitioner complains apparently that she was not given sufficient time to testify. The record will disclose that her case was terminated without pressure from any source to do so (R. 139). The record will further disclose that at no time did petitioner seek to continue the trial of the case for further testimony, to call witnesses, or for any other purpose. Clearly then, petitioner cannot now complain of lack of opportunity to be heard.

By statute (11 D. C. Code [1951 Ed.] § 773) there is no appeal as of right to the United States Court of Appeals for the District of Columbia Circuit. The allowance of an appeal from the Municipal Court of Appeals for the District of Columbia is a matter of sound judicial discretion. By Rule 1 of its Rules Governing Review of Cases from the Municipal Court of Appeals for the District of Columbia (similar in substance to Rule 38(5) of the Rules of this Court), the United States Court of Appeals for the District of Columbia Circuit has set forth the types of cases in which an appeal will be allowed.

With this statute and rule before it, the United States Court of Appeals for the District of Columbia Circuit con-

sidered this record and heard petitioner present oral argument for allowance of an appeal. It denied the allowance of an appeal and denied reconsideration. On the basis of that record, it cannot be said and indeed petitioner has not shown, that the Circuit Court of Appeals abused its discretion in denying the allowance to it of an appeal from the Municipal Court of Appeals for the District of Columbia.

CONCLUSION

In the Municipal Court and in the Municipal Court of Appeals for the District of Columbia, petitioner was represented by able and militant counsel of her own choice who was familiar with trial of cases in those forums. Before the United States Court of Appeals for the District of Columbia Circuit and before this Court, petitioner has elected to proceed in proper person.

A study of the record in those Courts and before this Court will disclose that on each occasion where this cause was before a court, petitioner had in that court a full and fair opportunity to present and argue her case.

The record before and the opinion of the Municipal Court of Appeals for the District of Columbia will further disclose that the primary question before the Municipal Court of Appeals for the District of Columbia was a disputed question of fact. In accordance with the Congressional mandate establishing the Court (11 D. C. Code [1951 Ed.] § 772(c)), the Municipal Court of Appeals, which had the power to review both the facts and the law, refused to set aside the judgment of the trial court and refused to reweigh the evidence, the judgment not being "plainly wrong or without evidence to support it." The decision of the Municipal Court of Appeals for the District of Columbia on the question of waiver was consistent with its prior rulings on the same subject. *Hall* v. *Henry J. Robb, supra.*

Petitioner by her brief and supplement thereto seeks to convert a case of a purely local nature into a case involv-

ing a constitutional issue. Mere assertion of a constitutional issue will not make this cause a constitutional case:

> "The constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here." *United Surety Company* v. *American Fruit Product Co., supra,* at p. 142.

For the foregoing reasons the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be summarily denied.

Respectfully submitted,

Milton W. King
Bernard I. Nordlinger
Wallace Luchs, Jr.
Robert B. Frank
419 Southern Building
Washington 5, D. C.
Attorneys for Respondent

APPENDIX A

STATUTES INVOLVED

NOTE: All citations to the District of Columbia Code are to the 1951 Edition.

11 D. C. Code § 772. Right to appeal — Final order or judgment — Interlocutory orders — Appeals to United States Court of Appeals for the District of Columbia — Procedure — Printing of record or briefs on appeal — Scope of review — Retroactive effect.

(a) Any party aggrieved by any final order or judgment of The Municipal Court for the District of Columbia, as created by subchapter I, ... may appeal therefrom as of right to The Municipal Court of Appeals for the District of Columbia . . . .

(b) . . . .

(c) The Municipal Court of Appeals for the District of Columbia . . . . shall review the record on appeal and shall affirm, reverse, or modify the order or judgment in accordance with law . . . . If the case shall have been tried without a jury, The Municipal Court of Appeals for the District of Columbia shall have the power to review both as to the facts and the law, but in such case the judgment of the trial court shall not be set aside except for errors of law or unless it appears that the judgment is plainly wrong or without evidence to support it.

(d) . . . .

11 D. C. Code § 773. Review of judgments in United States Court of Appeals for the District of Columbia— Procedure.

Any party aggrieved by any judgment of The Municipal Court of Appeals for the District of Columbia may seek a review thereof by the United States Court of Appeals for the District of Columbia by petition for the allowance

of an appeal . . . . Said Court of Appeals may prescribe rules governing the practice and procedure on such applications, the preparation of and the time for filing the transcript of the record in such cases, and generally to regulate all matters relating to appeals in such cases. If said Court of Appeals shall allow an appeal, the court shall review the record on appeal and shall affirm, reverse, or modify the order or judgment in accordance with law.

45 D. C. Code § 910. Ejectment or summary proceedings.

Whenever a lease for any definite term shall expire, or any tenancy shall be terminated by notice as aforesaid, and the tenant shall fail or refuse to surrender possession of the leased premises, the landlord may bring an action of ejectment to recover possession in the District Court of the United States for the District of Columbia; or the landlord may bring an action to recover possession before the municipal court, as provided in sections 11-701 to 11-749 of this Code.

45 D. C. Code (Supp. I) § 1601 (as Amended). Purposes — Time limit.

(a) . . . . Whereupon it is the purpose of this chapter and the policy of the Congress during the existing emergency to prevent undue rent increases and any other practices relating to housing accommodations in the District of Columbia which may tend to increase the cost of living or otherwise impede the national defense program.

(b) The provisions of this chapter, and all regulations, orders, and requirements thereunder, shall terminate on (July 31, 1953); . . . .

45 D. C. Code (Supp. I) § 1605. Prohibitions.

(a) . . . .

(b) No action or proceeding to recover possession of housing accommodations shall be maintainable by any landlord against any tenant, notwithstanding that the

tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled, unless—

(1) The tenant is (A) violating an obligation of his tenancy (other than an obligation to pay rent higher than rent permitted under this chapter or any regulation or order thereunder applicable to the housing accommodations involved or an obligation to surrender possession of such accommodations) or (B) is committing a nuisance or using the housing accommodations for an immoral or illegal purpose or for other than living or dwelling purposes; or . . . .

* * *

(c) . . . .

APPENDIX B

RULES OF COURT INVOLVED

Rules of the United States Court of Appeals for the District of Columbia Governing Review of Cases from the Municipal Court of Appeals for the District of Columbia.

Rule 1. Character of Cases which May be Considered.

Allowance of an appeal from the Municipal Court of Appeals is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicates the character of reasons which will be considered:

(a) Where the court below has decided a question of substance not theretofore determined by this court; or in a way probably not in accord with applicable decisions of this court; or contrary to a decision of the Supreme Court of the United States or of the District Court of the United States for the District of Columbia; or contrary to general law.

(b) Where the court below has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court, as to call for an exercise of this court's power of supervision.

(c) Where a question of general importance, or a question of substance relating to the construction or application of statutes or municipal ordinances or regulations, may be involved which has not been, but should be, settled by this court.